

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :
: 18 Cr. 637-1 (JSR)
-v- :
: MEMORANDUM ORDER
: 18 Cr. 637-1 (JSR)
KENNY PENA, :
: 18 Cr. 637-1 (JSR)
: 18 Cr. 637-1 (JSR)
Defendant. :
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JED S. RAKOFF, U.S.D.J.

Before the Court is the motion of defendant Kenny Pena for compassionate release, pursuant to 18 U.S.C. § 3582 (c) (1) (A). Pena is currently serving a 7-year sentence of imprisonment following his guilty plea in 2019 in this Court for using, carrying, and brandishing a firearm in relation to an attempted Hobbs Act robbery. He is incarcerated at FCI Danbury and set to be released in 2024.

Pena, who is 34 years old, now contends that, in light of the coronavirus pandemic, his history of asthma justifies his immediate release or, in the alternative, home confinement. The Government opposes. For the reasons set forth below, the motion is denied.

As mentioned, Pena seeks a sentence reduction pursuant to 18 U.S.C. § 3582(c)(1)(A). "A Court evaluating a motion under this statute must ask four questions: (1) has the defendant complied

with the administrative exhaustion requirement, (2) has the defendant shown extraordinary and compelling reasons warranting a sentence reduction, (3) are the 18 U.S.C. § 3553(a) sentencing factors consistent with a lesser sentence than that previously imposed, and (4) is there a particular sentence reduction consistent with the § 3553(a) factors that is also warranted by extraordinary and compelling reasons." United States v. Garcia, --- F. Supp. 3d ---, 2020 WL 7212962, at *2 (S.D.N.Y. Dec. 8, 2020). In this case, the Court holds that Pena has failed to demonstrate extraordinary and compelling reasons warranting a sentence reduction, and therefore does not reach the other questions.¹

"Since the onset of the coronavirus pandemic, courts have consistently held that the presence of underlying health conditions that increase the risks associated with COVID-19 can constitute extraordinary and compelling reasons for a sentence reduction." United States v. Rodriguez, No. 00-cr-761-2 (JSR), --- F. Supp. 3d ---, 2020 WL 5810161, at *3 (S.D.N.Y. Sept. 30, 2020). Here, Pena points to his history of asthma, which he says has been exacerbated by certain cleaning products that FCI Danbury

¹ While the Government disputes that Pena has satisfied the administrative exhaustion requirement, that requirement is not jurisdictional. See United States v. Haney, 454 F. Supp. 3d 316, 320 (S.D.N.Y. 2020). Because the Court denies the motion on other grounds, the Court need not and does not address the exhaustion requirement here.

has employed to fight a scabies outbreak in the facility. Def. Mem. at 3-4. Pena also contends that FCI Danbury has failed to control the spread of the virus, which to date has infected over 170 inmates, at least 95 of whom remain infectious, along with nearly 70 staff members.²

There is no denying that FCI Danbury has failed to contain the virus. But the Court is not persuaded that Pena's underlying health conditions constitute an extraordinary and compelling reason for release. According to the Center for Disease Control ("CDC"), certain diseases -- like cancer or diabetes -- definitively put people at an increased risk for severe illness from the virus that causes COVID-19.³ Inmates, especially older inmates, who suffer from one of these enumerated conditions are routinely found to have demonstrated an extraordinary and compelling reason for release; indeed, the Government often concedes as much. See, e.g., id. at *3 ("As the Government itself concedes, [obesity and diabetes] satisfy the extraordinary and compelling reason threshold.") (internal quotation marks and alterations omitted). By contrast, according to the CDC, "moderate to severe asthma" "may," but will not definitely, subject someone

² BOP: COVID-19 Update, <https://www.bop.gov/coronavirus/> (last accessed Dec. 20, 2020).

³ <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>.

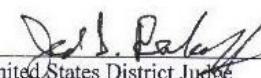
to heightened risk. Thus, especially where there is evidence that the asthma is well-controlled, courts will decline to find that asthma constitutes an extraordinary and compelling reason for release. See, e.g., United States v. Christie, No. 15-cr-288 (RMB), 2020 WL 3969962, at *2 (S.D.N.Y. July 14, 2020) ("Although [the defendant] has been diagnosed with asthma, his medical records demonstrate that his asthma is well-controlled. Accordingly, [the defendant] has not carried his burden of demonstrating 'extraordinary and compelling reasons' justifying release." (cleaned up)).

As the Government points out, BOP records indicate that Pena's asthma is "well controlled," and that "no asthma exacerbations have been documented in the past year." Gov. Mem. at 6. Even if, as the defense represents, the cleaning products associated with the scabies outbreak "have worsened [Pena's] asthmatic condition," Def. Mem. at 3, the Court finds that Pena, an otherwise healthy 34-year-old, has failed to demonstrate extraordinary and compelling reasons for release. For that reason, his motion must be denied.

The Clerk of the Court is directed to close the entry at docket number 63.

SO ORDERED.

Dated: New York, NY
December 21, 2020



United States District Judge